

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PUBLIC LUMBER CO., INC.,

Plaintiff-Appellant,

v

WILLIAM ROBBINS and ANDREA ROBBINS,

Defendants-Appellees.

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UNPUBLISHED  
February 21, 2006

No. 256707  
St. Clair Circuit Court  
LC No. 03-000861-CK

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Plaintiff appeals from the order dismissing its complaint under MCR 2.401(G) as a sanction for the failure of plaintiff's attorney to attend a pretrial conference. We vacate and remand.

The parties entered a home improvement contract. Homeowner defendants were not satisfied with the materials and installation and refused to pay the remaining balance under the contract until the work was completed satisfactorily. Plaintiff lumber company sued defendants for the balance they owed under the contract and for slander and tortious interference with business relations.

Attorneys for both parties appeared for the first pretrial, although plaintiff's attorney arrived two hours late. The judge directed the parties to pursue facilitation and scheduled another pretrial. The parties were unable to resolve their dispute. Defendants' attorney attended the second pretrial, but plaintiff's attorney did not attend. Defendants' attorney moved to dismiss plaintiff's complaint with prejudice and requested costs. The judge granted defendants' motion. The judge's complete consideration of the motion on the record is as follows:

This is the second time that he [plaintiff's counsel] made [sic] has missed court appearances without excuse. Motion for dismissal is granted with prejudice and costs will be attached.

Plaintiff's attorney timely moved to set aside the dismissal and noticed it for a hearing. Because of the parties' schedules and because they were considering possible resolutions to their dispute, the motion was subsequently re-noticed four more times. Plaintiff's attorney then appears to have "renewed" the motion by re-filing the same motion as a "re-motion" and

noticing it for a hearing. The judge denied the motion because it was not brought within the “time frame” for motions for relief from judgment.

Plaintiff now appeals by right claiming that the judge abused his discretion in dismissing the complaint for the failure of its attorney to attend the second pretrial and that the judge wrongly denied of its motion to set aside the dismissal. We agree.

A decision on whether to set aside a default is reviewed for an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999); *Schell v Baker Furniture, Co*, 232 Mich App 470, 474; 591 NW2d 349 (1998), *aff’d* 461 Mich 502; 607 NW2d 358 (2000). A court’s interpretation and application of a court rule is reviewed de novo as a legal issue. *Peters v Gunnell, Inc*, 253 Mich App 211, 225-226; 655 NW2d 582 (2002).

It appears that the trial judge abused his discretion in dismissing plaintiff’s complaint because he based his decision on a factual error and because he failed to comply with the requirements that this Court established in *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 507; 536 NW2d 280 (1995), resulting in a sanction of dismissal that is too harsh of a sanction under prevailing law. The trial judge stated on the record that plaintiff’s attorney had twice failed to appear for a scheduled appearance. From our review of the record and the briefs, it appears that plaintiff’s attorney actually only failed to appear for the second pretrial and had attended the first pretrial, although he was two hours late. Under MCR 2.401(G), the failure of a party or the party’s attorney to attend a scheduled conference as directed by the court constitutes a ground for dismissal. However, dismissal is the harshest sanction available against a plaintiff and is warranted only in extreme cases. *Schell, supra*; *Vicencio, supra*.

In *Vicencio*, this Court noted that disposition of litigation on the merits is favored and that dismissal is a drastic step that should be taken cautiously. This Court also cautioned that, before imposing dismissal as a sanction, a trial court must “carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper.” *Id.* at 506. The trial court must consider:

(1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Id.* at 507.]

In this case, the trial judge did not comply with the requirements of *Vicencio* to consider the enumerated factors on the record. Further, based on our review of the record, there is no evidence of willfulness in failing to attend the conference; rather, plaintiff’s attorney claims it was accidental. There is also no evidence of plaintiff’s history of refusing to comply with previous orders of the court, deliberate delay, or prejudice to defendants. Further, plaintiff’s attorney attempted to cure his nonattendance by offering to pay defendants’ costs and rescheduling the conference. Moreover, the court did not consider on the record whether a lesser sanction would better serve the interests of justice as required by *Vicencio*.

It also appears that the judge legally erred in denying plaintiff's motion to set aside the dismissal based on the length of time before plaintiff brought the motion on for a hearing. MCR 2.612(C)(1)(a) allows a court to relieve a party from a judgment or order based on "mistake, inadvertence, surprise, or excusable neglect." MCR 2.612(C)(2) requires the party seeking relief to so move "within a reasonable time" and provides up to a year for motions made on the basis of "mistake, inadvertence, surprise, or excusable neglect." Here, plaintiff's attorney claims he failed to attend the conference by mistake. Thus, plaintiff's motion and "re-motion," if they are considered to be separate motions, were both timely because they were filed within a year of the dismissal.<sup>1</sup> Further, we note that MCR 2.612 does not impose a limitation period or "time frame" in which a timely filed motion must be heard. Neither the trial judge nor defendants have identified any authority for that proposition. Without any authority, the decision lacks a basis in law. Moreover, it appears that the decision also lacks a basis in fact because plaintiff had immediately noticed the original motion for a hearing when it was filed. The motion was also re-noticed four additional times as the parties explored possible resolutions to their dispute. Even when the motion or "re-motion" was finally heard on the sixth notice, it was heard within one year of the dismissal.

The failure of the trial judge to evaluate the *Vicencio* factors on the record substantially impairs this Court's ability to review whether he abused his discretion. However, based on the record, it is clear that he ignored the requirements of *Vicencio*. Therefore, we vacate the July 21, 2003 order of dismissal and remand the case for further proceedings consistent with this opinion.

Vacated and remanded. This Court does not retain jurisdiction.

/s/ Patrick M. Meter  
/s/ William C. Whitbeck  
/s/ Bill Schuette

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<sup>1</sup> Plaintiff's first motion to set aside was filed on August 11, 2003, within 21 days of entry of the final order of dismissal. In our view, plaintiff's "re-motion" filed on April 27, 2004 was merely a renewal of its original motion to set aside.